BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN HIGGINS Claimant VS. **ABILENE MACHINE, INC.** Respondent AND **CONTINENTAL NATIONAL AMERICAN GROUP** Insurance Carrier	)	Docket No. 225,539
JOHN HIGGINS Claimant VS. **DUCKWALL ALCO STORES, INC.** Respondent AND **ARCH INSURANCE CO. and LIBERTY MUTUAL FIRE INSURANCE CO.** Insurance Carriers	)	Docket No. 1,042,191

ORDER

STATEMENT OF THE CASE

Respondent Duckwall Alco Stores, Inc., (Duckwall) and its insurance carrier Arch Insurance Co. (Arch) requested review of the August 19, 2009, Review and Modification Award entered by Administrative Law Judge Rebecca Sanders. The Board heard oral

argument on December 2, 2009. Robert R. Lee, of Wichita, Kansas, appeared for claimant. Ryan D. Weltz, of Wichita, Kansas, appeared for respondent Abilene Machine, Inc., (Abilene Machine) and its insurance carrier Continental National American Group (Continental). Thomas J. Walsh, of Roeland Park, Kansas, appeared for respondent Duckwall and its insurance carrier Arch. Andrew D. Wimmer, of Kansas City, Missouri, appeared for respondent Duckwall and its insurance carrier Liberty Mutual Fire Insurance Co. (Liberty).

In Docket No. 225,539, the Administrative Law Judge (ALJ) denied claimant's request for review and modification.

In Docket No. 1,042,191, the ALJ found that claimant suffered an aggravation or acceleration of his preexisting back condition while working at Duckwall. Accordingly, the ALJ found that claimant suffered a new injury that arose out of and in the course of his employment with Duckwall. The ALJ further found that claimant was permanently and totally disabled with an average weekly wage of $498.87 on the date of accident of August 12, 2008, the date the authorized physician took claimant off work.[1] The ALJ found Abilene Machine liable for claimant's authorized medical expenses until August 12, 2008, the date of the new accident.

The Board has considered the record and adopted the stipulations listed in the Award. The Stipulation filed June 19, 2009, in Docket No. 1,042,191 was not approved or signed by counsel for Duckwall and Liberty Mutual Insurance Company. But at oral argument, counsel for the parties agreed that the stipulation was acceptable and should be considered by the Board. In addition, the parties agreed that claimant's gross average weekly wage inclusive of fringe benefits totaled $596.42.

ISSUES

There has been no appeal of the ALJ's finding that claimant is permanently and totally disabled. The primary issue is which employer and which insurance carrier should be liable for those disability benefits. The ALJ denied claimant's request for review and modification in Docket No. 225,539 and instead determined that claimant's subsequent work at Duckwall was the cause of his permanent total disability. Claimant and Abilene Machine contend the ALJ's denial of claimant's application for review and modification should be affirmed, but Abilene Machine also contends that it should not be liable for the cost of claimant's medical treatment after he commenced work for Duckwall.

In Docket No. 1,042,191, Duckwall and Arch contend that claimant's current condition is the natural and probable consequence of his preexisting injury in Docket No. 225,539 rather than a new and separate injury. In the event the Board finds claimant's

[1] This average weekly wage was exclusive of fringe benefits.

current condition is not the natural and probable consequence of his preexisting injury, Duckwall and Arch argue that the date of claimant's new injury would be the date in May 2008 when Dr. Gary Coleman restricted claimant from performing the work that allegedly caused his current condition. Further in the event the Board finds claimant's current condition is not the natural and probable consequence of his preexisting injury, Duckwall and Arch assert that claimant's award should be reduced by the amount of his preexisting functional impairment.

Duckwall and Liberty contend that claimant's current condition is the natural and probable consequence of his preexisting injury rather than a new and separate injury. In the event the Board finds claimant's current condition is not the natural and probable consequence of his preexisting injury, Duckwall and Liberty argue that the ALJ was correct in finding claimant's date of accident to be the date he last worked for Duckwall, that being August 12, 2008. Duckwall and Liberty also assert that in the event the Board finds claimant's current condition is not the natural and probable consequence of his preexisting injury, claimant's award should be reduced by the amount of his preexisting functional impairment.

Claimant contends he is permanently, totally disabled as a result of injuries arising from the activities he performed while employed at Duckwall and, therefore, requests that the Board affirm the Review and Modification Award. Claimant further contends the ALJ correctly found his date of accident to be August 12, 2008. Claimant denies that respondent has proven its entitlement to an offset or credit.

The issues for the Board's review are:

(1) Is claimant's current condition the natural and probable consequence of his 1997 injury sustained while working for Abilene Machine, or is his condition the result of a new and separate injury or aggravation of his preexisting injury sustained while working for Duckwall?

(2) If claimant's current condition is the result of a new and separate accident or aggravation sustained while working for Duckwall, what was his date of accident and which respondent and insurance carrier or carriers are liable for claimant's disability and medical benefits?

(3) If claimant's current condition is the result of a new and separate accident or aggravation sustained while working for Duckwall, should claimant's award be reduced by the amount of his preexisting functional impairment?

FINDINGS OF FACT

Claimant was injured in February 1997 when he was working for Abilene Machine. An application for hearing was filed on August 4, 1997, and the claim was assigned Docket

No. 225,539. Claimant was treated by Dr. Ali Manguoglu, who performed a discectomy at L4-5 on September 30, 1997. An agreed Award was entered on July 30, 1998, awarding claimant a 16 percent permanent partial impairment to the body as a whole. Claimant had a hemilaminectomy at L4-5 and decompression of the nerve roots at L4-5 and L5-S1 on March 18, 1999, also performed by Dr. Manguoglu. Claimant's pain continued, and on May 26, 2000, he underwent a laminectomy at L4 and L5, performed by Dr. Paul Stein, and a posterolateral fusion from L4 to S1, performed by Dr. Bernard Poole. Dr. Poole performed another surgery on June 29, 2001, to remove some hardware from claimant's back.

On September 21, 2001, Dr. Poole released claimant from treatment with a 50-pound lifting restriction, to be done with good body mechanics. Claimant was also advised to avoid repetitive bending, stooping, and lifting from a stooped or bent-over position. Claimant filed an application for review and modification, and on March 18, 2002, an agreed Award on Review and Modification was filed, which increased claimant's award for permanent partial impairment in Docket No. 225,539 to 22.5 percent.

On October 20, 2001, claimant went to work for Duckwall as a material handler. He made Duckwall aware of his restrictions at the time he was hired. In October 2004, claimant transferred to a job as a reach truck driver.

On September 28, 2005, claimant filed an application for post award medical in Docket No. 225,539. At a post-award hearing held March 30, 2006, respondent Abilene Machine questioned causation of claimant's need for treatment because claimant had worked for Duckwall for four and a half years. Claimant testified that he had not worked outside his restrictions, including the 50-pound lifting restriction. He described his job at Duckwall as requiring him to drive a reach truck, which is a forklift that is operated while standing. He said he basically worked on a reach truck the entire day. He said he did not have to twist his body to look behind him when operating the reach truck. He initially testified that the most he was required to lift in his job was 50 pounds.

Claimant testified that his pain had gradually increased since September 2001, and he had sought relief from his personal physician, Dr. Gary Coleman, who became authorized by the ALJ's order of August 21, 2006. Claimant said that on a scale from 1 to 10, his pain was somewhere between an 8 and a 9. He complained of problems sleeping because of pain and of a constant burning sensation in his legs that did not necessarily get worse with activities. He said his pain was worse when he sat or stood for long periods of time. Dr. Coleman said that claimant had developed degenerative disc disease at L3-4. He opined that claimant's work activities did not cause claimant's degenerative disc disease at L3-4.

Dr. Poole was authorized by respondent to evaluate claimant on January 5, 2006. He stated that claimant's fusion from L4 to S1 appeared to be stable. He found that claimant had moderate degenerative disc disease at the L3-4 level, above the fusion, as

well as some stenosis. He was not sure whether claimant's problems stemmed from the L3-4 level or the L5-S1 level, but said it was most probable that the symptoms were coming from the L3-4 level. He said that claimant's symptoms were consistent with someone who is developing progressive degenerative change at the L3-4 disc and facet joint level. He said claimant's condition may worsen over time.

Dr. Stein evaluated claimant on May 3, 2006, at the request of claimant's attorney. Claimant told him that he had not had an additional injury but had started having recurrent, progressive back and left leg pain beginning about six months earlier. He described his job to Dr. Stein as a reach truck operator with minimal lifting and bending. Claimant complained of pain in his low back that extended into both buttocks and down the back of his left leg and occasionally down his right leg. He said he had difficulty sitting and standing for long periods of time. Dr. Stein opined that claimant's fusion was solid. He said that claimant had degenerative disc disease at the L3-4 level, which he believed was the source of claimant's current back pain. At that time, he did not think that claimant's work activity at Duckwall would cause a change in the physical structure of his body, at least not to the extent of claimant's change.

On August 21, 2006, an administrative law judge found that claimant's symptoms were the result of the natural and probable progression of his 1997 accident, and Abilene Machine was ordered to provide claimant with necessary medical treatment. In April 2007, Dr. Doss implanted a spinal cord stimulator into claimant's back. Claimant continues to be seen by Dr. Doss for adjustments to his spinal cord stimulator. He also is seen by Dr. Matthew Pouliot for pain management.

Claimant continued to be seen by Dr. Coleman. In May 2008, Dr. Coleman took claimant off work for two weeks and then gave him a 20-pound lifting restriction and restrictions against frequent bending and prolonged standing. In August 2008, Dr. Coleman told claimant that he could no longer work, and claimant's last day at Duckwall was August 12, 2008. On September 26, 2008, claimant filed an application for hearing with the Division of Workers Compensation, claiming a work related series of injuries to his low back and legs at Duckwall from January 1, 2008, to August 12, 2008. This claim was assigned Docket No. 1,042,191. His application for hearing was amended on April 22, 2009, to show his series of injuries beginning October 2001 and ending on August 12, 2008. Claimant also filed an Application for Review and Modification in Docket No. 225,539.

In his discovery deposition of March 25, 2009, and in his testimony at the regular hearing and review and modification hearing held April 16, 2009, claimant's testimony concerning his job at Duckwall was somewhat different than his previous testimony. Claimant testified he worked as a material handler for Duckwall from October 2001 until October 2004 and his job required frequent stooping, occasional crouching and constant lifting from 25 to 100 plus pounds. He said he tried to get help when required to lift something that was too heavy. But at some point his supervisor told him that he could not

always ask for help. When claimant transferred to Duckwall's distribution center, the majority of his time was spent operating a reach truck, the job he had previously described in his earlier testimony in Docket No. 225,539. However, claimant now claims that since 2004, he had occasionally worked in aerosol containment, which required him to physically go into a trailer and lift and carry boxes of merchandise, load the boxes onto a pallet, cut the lids off the boxes, and place the boxes on racks. He performed the duties in aerosol containment two or three times a year for a month at a time.

Claimant said the pain he has now is worse than it was when he started at Duckwall in 2001. When he started working there, he put his pain at an average of 6 on a scale of 0 to 10, and it would go up to 8 on a bad day. Now, he would rate his pain average at 7, and it will go up to a 9 or 10. He went to the hospital once because the pain was so bad, and he was given a couple of injections in his back. Claimant believes that the lifting, bending, twisting and constant standing he did at Duckwall contributed to his increased pain.

Dr. Stein examined claimant on November 3, 2008, at the request of claimant's attorney. He had not seen claimant since May 2006. He said there were three potential reasons for claimant's degenerative change at L3-4: (1) natural process of his disease, (2) additional stress placed by the fusion, and (3) other factors putting stress on that level.

At the time Dr. Stein examined claimant in November 2008, he was under the impression that claimant's job at Duckwall consisted of operating a reach truck, which required him to stand eight hours a day. Under that scenario, Dr. Stein opined that the work activity at Duckwall was an aggravating factor leading to increased pain but was not necessarily causing a structural change in the lower back. After reviewing a task list prepared by Jerry Hardin and reviewing claimant's March 2009 deposition testimony, Dr. Stein became aware that for a period of two to three years, claimant's work activity at Duckwall involved heavy lifting and bending, activity which would affect the L3-4 disc level and probably have some effect on the degenerative change at that level. Dr. Stein also noted that even after claimant's job entailed operating a reach truck, there were periods of time when he had to spend several hours a day doing work activity that involved heavy lifting and bending. With that information in mind, Dr. Stein concluded there were two factors involved in claimant's degenerative process at L3-4. The first was the additional stress on the L3-4 level by the previous L4 to S1 fusion, which would relate back to his original injury. The second factor was his work activity at Duckwall above and beyond just standing on and operating a reach truck, including the lifting, bending and twisting over the course of a period of time. Consequently, Dr. Stein opined that claimant's current status was a combination of those two factors. He could not determine within a reasonable degree of medical certainty which factor was most important, but both of them were contributory. It is now his opinion, within a reasonable degree of medical probability, that claimant's work, starting in 2001, for Duckwall permanently aggravated his preexisting condition. He said claimant had an additional 3 percent impairment that was the result, at least partially, of that permanent aggravation.

Dr. Stein said claimant is unable to work because of his preexisting condition, the aggravation, the pain medication he is taking, the pain he is feeling, as well as his intellectual status and his work experience. Even if claimant could perform a desk job, he could not do a job that would require prolonged sitting, prolonged standing, driving, or working eight hours a day.

PRINCIPLES OF LAW AND ANALYSIS

(1) Is claimant's current condition the natural and probable consequence of his 1997 injury sustained while working for Abilene Machine, or is his condition the result of a new and separate injury or aggravation of his preexisting injury sustained while working for Duckwall?

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[3] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[4]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[5]

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[2] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[3] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[4] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[5] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[7] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[10]

In *Logsdon*,[11] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[12] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

The injury claimant suffered while working for Abilene Machine resulted in a herniated disc at L4-5. This injury resulted in a discectomy, hemilaminectomy and laminectomy at L4-5. He also underwent decompression of the nerve roots and a two-level fusion at L4-5 and L5-S1. Thereafter, claimant was released from treatment with restrictions against lifting over 50 pounds and to avoid repetitive bending, stooping and lifting from a stooped or bent-over position. He went to work for Duckwall on October 20, 2001. His work required him to exceed his restrictions. His symptoms worsened, and he suffered additional injuries, including a new injury at L3-4. Although claimant's preexisting condition contributed to claimant's condition, including his need for treatment at the L3-4 level, the Board finds that it was not a direct and natural consequence of his preexisting condition. Instead, the worsening, aggravation and new injuries were a result of claimant's subsequent work activities with Duckwall. Claimant has met his burden of proving that his current condition is compensable as a new series of accidents. The Board affirms the

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[10] *Id.* at 728.

[11] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

ALJ's finding that claimant suffered a new injury that arose out of and in the course of his employment at Duckwall.

(2) If claimant's current condition is the result of a new and separate accident or aggravation sustained while working for Duckwall, what was his date of accident and which respondent and insurance carrier or carriers are liable for claimant's disability and medical benefits?

K.S.A. 2008 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.

Claimant was given new work restrictions by Dr. Coleman in May 2008. However, it cannot be said that those restrictions prevented claimant from performing the work which was the cause of his injuries because claimant continued to perform the same job in violation of those restrictions.[13] Furthermore, his condition continued to worsen until Dr. Coleman took him off work altogether on August 12, 2008. The Board affirms the ALJ's finding of a series of accidents through the last day worked. As such, Duckwall and Arch are liable for claimant's permanent total disability compensation because Arch was the workers compensation insurance provider for Duckwall on August 12, 2008. Duckwall and Arch are likewise liable for claimant's medical treatment expenses from that date. This case presents an unusual legal scenario with respect to the liability for the medical treatment expenses for the period of time after claimant went to work for Duckwall until August 12, 2008. Claimant alleged and the Board finds claimant suffered a series of accidents each and every working day at Duckwall from October 25, 2001, through August 12, 2008. Generally, the Board would order the insurance carrier on the risk at the time the medical treatment was provided to pay for that treatment. In this case, that would mean Liberty would be liable until June 1, 2008, when Arch became the workers compensation carrier for Duckwall. However, in a post-award medical Award entered on August 21, 2006, in Docket No. 225,539, the ALJ found Abilene Machine and Continental liable for claimant's medical treatment. That order was not a preliminary hearing order and

[13] Depo. of John Higgins, Mar. 25, 2009, at 32, 82-83.

so it is final. In addition, on January 9, 2008, the ALJ approved an agreed Order for Post-Award Medical Treatment whereby Abilene Machine was ordered to pay certain additional medical treatment expenses incurred subsequent to the order or June 1, 2008.[14] Under this unusual procedural history and these unusual facts, the Board agrees with and affirms the ALJ's conclusion that Abilene Machine and Continental are liable for medical treatment expenses incurred before August 12, 2008.

(3) If claimant's current condition is the result of a new and separate accident or aggravation sustained while working for Duckwall, should claimant's award be reduced by the amount of his preexisting functional impairment?

K.S.A. 2008 Supp. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

K.S.A. 44-510a states:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
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> (b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the

[14] The Application for Review and Modification in Docket No. 225,539, which is now before the Board, was not filed until November 21, 2008, and the first Application for Hearing in Docket No. 1,042,191 was filed September 26, 2008.

> total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

Claimant's eligibility for disability compensation for his injuries at Abilene Machine is past. Therefore, K.S.A. 44-510a is not applicable to this claim. Claimant's current permanent total disability takes into consideration claimant's total circumstances and, as such, is a result of his injuries, impairments, restrictions and limitations from both his work at Abilene Machine as well as those resulting from his work at Duckwall. Accordingly, Duckwall is entitled to a credit for claimant's preexisting impairment under K.S.A. 44-501(c), which the parties agree is 20 percent.

CONCLUSION

(1) Claimant suffered new and separate injuries as a result of a series of accidents that occurred while working for Duckwall.

(2) Claimant's date of accident is August 12, 2008. Duckwall and Arch are liable for claimant's workers compensation benefits commencing on that date.

(3) Claimant's permanent total disability should be reduced by his preexisting 20 percent permanent impairment of function.

AWARD

Docket No. 225,539

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Rebecca Sanders dated August 19, 2009, is affirmed.

Docket No. 1,042,191

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Rebecca Sanders dated August 19, 2009, is modified to grant Duckwall and Arch a 20 percent credit for claimant's preexisting impairment but is otherwise affirmed.

Claimant is entitled to permanent total disability compensation at the rate of $397.63 per week not to exceed $125,000 for a permanent total general body disability, less a credit for the preexisting 20 percent functional impairment.

As of January 8, 2010, there would be due and owing to the claimant 73.43 weeks of permanent total disability compensation at the rate of $397.63 per week in the sum of

$29,197.97, which is ordered paid in one lump sum less amounts previously paid. Respondent is entitled to a 20 percent credit for claimant's preexisting impairment in the amount of $33,003.29. Thereafter, the remaining balance in the amount of $62,798.74 shall be paid at $397.63 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent Abilene Machine and its Insurance Carrier
Thomas J. Walsh, Attorney for Respondent Duckwall and its Insurance Carrier, Arch Insurance Co.
Andrew D. Wimmer, Attorney for Respondent Duckwall and its Insurance Carrier, Liberty Mutual Fire Insurance Co.
Rebecca Sanders, Administrative Law Judge